

1 EDMUND G. BROWN JR.
2 Attorney General of the State of California
3 DANE R. GILLETTE
4 Chief Assistant Attorney General
5 JULIE L. GARLAND
6 Senior Assistant Attorney General
7 JESSICA N. BLONIEN
8 Supervising Deputy Attorney General
9 STACEY D. SCHESSER, State Bar No. 245735
10 Deputy Attorney General
11 455 Golden Gate Avenue, Suite 11000
12 San Francisco, CA 94102-7004
13 Telephone: (415) 703-5774
14 Fax: (415) 703-5843
15 Email: Stacey.Schesser@doj.ca.gov

Attorneys for Respondent Warden Ayers
SF2008200231

10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

14

ISIDRO ROMERO,

C07-06382 TEH

16

Petitioner,

17

5

Judge: The Hon. Thelton E. Henderson

18

ROBERT L. AYERS, JR.,

Respondent.

20

**ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS;
MEMORANDUM OF POINTS AND AUTHORITIES**

22

23

24

25

26

27

Answer: Supporting Mem. of P & A

Romero v. Ayers
C07-06382 TEH

1 TABLE OF CONTENTS
2

	Page
3 MEMORANDUM OF POINTS AND AUTHORITIES	5
4 INTRODUCTION	5
5 ARGUMENT	5
6 I. ROMERO HAS NOT SHOWN THAT HE IS ENTITLED TO RELIEF	5
7 UNDER AEDPA.	
8 A. Romero Has Not Shown that the State Court Decisions Were	6
9 Contrary to Clearly Established Federal Law.	
10 B. Romero Has Not Shown that the State Courts Unreasonably Applied	8
11 Clearly Established Federal Law.	
12 C. Romero Has Not Shown that the State Court Decisions Were Based	9
13 on an Unreasonable Determination of the Facts.	
14 CONCLUSION	11
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

1 TABLE OF AUTHORITIES
2

		Page
3	Cases	
4	<i>Baja v. Ducharme</i> 187 F.3d 1075 (9th Cir. 1999)	5
5	<i>Benny v. U.S. Parole Comm'n</i> 295 F.3d 977 (9th Cir. 2002)	5
6		
7	<i>Biggs v. Terhune</i> 334 F.3d 910 (9th Cir. 2003)	7
8		
9	<i>Carey v. Musladin</i> 549 U.S. 70 (2006)	6
10	<i>Crater v. Galaza</i> 491 F.3d 1119 (9th Cir. 2007)	7
11		
12	<i>Duhaime v. Ducharme</i> 200 F.3d 597 (9th Cir. 2000)	7
13		
14	<i>Earp v. Ornoski</i> 431 F.3d 1158 (9th Cir. 2005)	7
15		
16	<i>Foote v. Del Papa</i> 492 F.3d 1026 (9th Cir. 2007)	7
17		
18	<i>Greenholtz v. Inmates of Neb. Penal & Corr. Complex</i> 442 U.S. 1 (1979)	3, 4, 6, 8
19		
20	<i>Hayward v. Marshall</i> 527 F.3d 797 (9th Cir. 2008)	3, 7
21		
22	<i>In re Rosenkrantz</i> 29 Cal. 4th 616 (2002)	8
23		
24	<i>Iron v. Carey</i> 505 F.3d 846 (9th Cir. 2007)	7
25		
26	<i>Langford v. Day</i> 110 F.3d 1380 (9th Cir. 1984)	3
27		
28	<i>Lockyer v. Andrade</i> 538 U.S. 63 (2003)	6, 8
29		
30	<i>Nguyen v. Garcia</i> 477 F.3d 716 (9th Cir. 2007)	7
31		
32	<i>Pulley v. Harris</i> 465 U.S. 37 (1984)	3
33		

TABLE OF AUTHORITIES (continued)

	Page	
1	<i>Sandin v. Connor</i>	
2	515 U.S. 472 (1995)	3, 6
3		
4	<i>Sass v. California Board of Prison Terms</i>	
5	461 F.3d 1123 (9th Cir. 2006)	3, 7
6		
7	<i>Schrivo v. Landrigan</i>	
8	— U.S. ___, 127 S. Ct. 1933 (2007)	7
9		
10	<i>Superintendent v. Hill</i>	
11	472 U.S. 445 (1985)	5, 7-10
12		
13	<i>Wilkinson v. Austin</i>	
14	545 U.S. 209 (2005)	3, 6
15		
16	<i>Williams v. Taylor</i>	
17	529 U.S. 362 (2000)	6, 8
18		
19	<i>Wright v. Van Patten</i>	
20	— U.S. ___, 128 S. Ct. 743 (2008)	7
21		
22	<i>Ylst v. Nunnemaker</i>	
23	501 U.S. 797 (1991)	9
24		
25	Statutes	
26	United States Code, Title 28	
27	§ 2244(d)(1)	3
28	§ 2254	2, 3
29	§ 2254(d)	8
30	§ 2254(d)(1-2) (2000)	6
31	§ 2254(e)(1)	9
32	§ 2254(d)(1)	7
33	§ 2254(d)(2)	9
34		
35	Other Authorities	
36	Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)	5, 7, 8
37		
38		
39		
40		
41		
42		
43		
44		
45		
46		
47		
48		
49		
50		
51		
52		
53		
54		
55		
56		
57		
58		
59		
60		
61		
62		
63		
64		
65		
66		
67		
68		
69		
70		
71		
72		
73		
74		
75		
76		
77		
78		
79		
80		
81		
82		
83		
84		
85		
86		
87		
88		
89		
90		
91		
92		
93		
94		
95		
96		
97		
98		
99		
100		
101		
102		
103		
104		
105		
106		
107		
108		
109		
110		
111		
112		
113		
114		
115		
116		
117		
118		
119		
120		
121		
122		
123		
124		
125		
126		
127		
128		
129		
130		
131		
132		
133		
134		
135		
136		
137		
138		
139		
140		
141		
142		
143		
144		
145		
146		
147		
148		
149		
150		
151		
152		
153		
154		
155		
156		
157		
158		
159		
160		
161		
162		
163		
164		
165		
166		
167		
168		
169		
170		
171		
172		
173		
174		
175		
176		
177		
178		
179		
180		
181		
182		
183		
184		
185		
186		
187		
188		
189		
190		
191		
192		
193		
194		
195		
196		
197		
198		
199		
200		
201		
202		
203		
204		
205		
206		
207		
208		
209		
210		
211		
212		
213		
214		
215		
216		
217		
218		
219		
220		
221		
222		
223		
224		
225		
226		
227		
228		
229		
230		
231		
232		
233		
234		
235		
236		
237		
238		
239		
240		
241		
242		
243		
244		
245		
246		
247		
248		
249		
250		
251		
252		
253		
254		
255		
256		
257		
258		
259		
260		
261		
262		
263		
264		
265		
266		
267		
268		
269		
270		
271		
272		
273		
274		
275		
276		
277		
278		
279		
280		
281		
282		
283		
284		
285		
286		
287		
288		
289		
290		
291		
292		
293		
294		
295		
296		
297		
298		
299		
300		
301		
302		
303		
304		
305		
306		
307		
308		
309		
310		
311		
312		
313		
314		
315		
316		
317		
318		
319		
320		
321		
322		
323		
324		
325		
326		
327		
328		
329		
330		
331		
332		
333		
334		
335		
336		
337		
338		
339		
340		
341		
342		
343		
344		
345		
346		
347		
348		
349		
350		
351		
352		
353		
354		
355		
356		
357		
358		
359		
360		
361		
362		
363		
364		
365		
366		
367		
368		
369		
370		
371		
372		
373		
374		
375		
376		
377		
378		
379		
380		
381		
382		
383		
384		
385		
386		
387		
388		
389		
390		
391		
392		
393		
394		
395		
396		
397		
398		
399		
400		
401		
402		
403		
404		
405		
406		
407		
408		
409		
410		
411		
412		
413		
414		
415		
416		
417		
418		
419		
420		
421		
422		
423		
424		
425		
426		
427		
428		
429		
430		
431		
432		
433		
434		
435		
436		
437		
438		
439		
440		
441		
442		
443		
444		
445		
446		
447		
448		
449		
450		
451		
452		
453		
454		
455		
456		
457		
458		
459		
460		
461		
462		
463		
464		
465		
466		
467		
468		
469		
470		
471		
472		
473		
474		
475		
476		
477		
478		
479		
480		
481		
482		
483		
484		
485		
486		
487		
488		
489		
490		
491		
492		
493		
494		
495		
496		
497		
498		
499		
500		
501		
502		
503		
504		
505		
506		
507		
508		
509		
510		
511		
512		
513		
514		
515		
516		
517		
518		
519		
520		
521		
522		
523		
524		
525		
526		
527		
528		
529		
530		
531		
532		
533		
534		
535		
536		
537		
538		
539		
540		
541		
542		
543		
544		
545		
546		
547		
548		
549		
550		
551		
552		
553		
554		
555		
556		
557		
558		
559		
560		
561		
562		
563		
564		
565		
566		
567		
568		

1 EDMUND G. BROWN JR.
2 Attorney General of the State of California
3 DANE R. GILLETTE
4 Chief Assistant Attorney General
5 JULIE L. GARLAND
6 Senior Assistant Attorney General
7 JESSICA N. BLONIEN
8 Supervising Deputy Attorney General
9 STACEY D. SCHESSER, State Bar No. 245735
10 Deputy Attorney General
11 455 Golden Gate Avenue, Suite 11000
12 San Francisco, CA 94102-7004
13 Telephone: (415) 703-5774
14 Fax: (415) 703-5843
15 Email: Stacey.Schesser@doj.ca.gov

16 Attorneys for Respondent Warden Ayers
17 SF2008200231

18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 **ISIDRO ROMERO,**

22 Petitioner,

23 v.

24 **ROBERT L. AYERS, JR.,**

25 Respondent.

26 C07-06382 TEH

27 **ANSWER TO PETITION FOR WRIT
28 OF HABEAS CORPUS;
29 MEMORANDUM OF POINTS AND
30 AUTHORITIES**

31 Judge: The Hon. Thelton E. Henderson

32 As an Answer to the Petition for Writ of Habeas Corpus filed by inmate Isidro Romero,
33 Respondent Robert Ayers, Acting Warden, admits, alleges, and denies that:

34 1. Romero is in the lawful custody of the California Department of Corrections and
35 Rehabilitation following his May 16, 1985 conviction of second-degree murder with a weapon
36 enhancement. (Pet. at 3.) Romero is serving a sentence totaling sixteen years to life in prison.
37 (*Id.*)

38 2. In 2007, Romero filed a petition for writ of habeas corpus in Orange County Superior
39 Court, alleging that Board of Parole Hearings' March 7, 2007 decision denying him parole

40 Answer; Supporting Mem. of P & A

41 *Romero v. Ayers*
42 C07-06382 TEH

1 violated his due process rights. (Ex. 1, Super. Ct. Pet.) The superior court denied the petition,
 2 finding that "Because [Romero's] threat to society if released is directly related to his permanent
 3 abstention from alcohol use, the Board's conclusion that he would still pose a threat to society if
 4 released, based [on] the aforementioned deficiencies in this area (including but not limited to his
 5 failure to regularly attend AA from 2000 through 2005), is supported by the record.
 6 Consequently, the denial of parole is supported by 'some evidence' and was not an abuse of
 7 discretion. [Citations]." (Ex. 2, Super Ct. Order at 6.)

8 3. Romero then raised the same claims in petitions to the California Court of Appeal and
 9 the California Supreme Court. (Ex. 3, Ct. App. Pet.; Ex. 4, Ct. App. Order; Ex. 5, Sup. Ct. Pet;
 10 Ex. 6, Sup. Ct. Order.) Both petitions were summarily denied. (Exs. 4, 6.)

11 4. Respondent alleges that Romero failed to allege that he properly exhausted his state
 12 court remedies regarding the claim that the Board's 2007 decision violated his due process
 13 rights.^{1/} On page six of his federal Petition, Romero states "N/A" in the lines where he is
 14 supposed to allege and prove exhaustion. The burden to show proper exhaustion is on the
 15 petitioner under 28 U.S.C. § 2254. (Pet. at 6.) However, because Romero attached state court
 16 petitions showing denials of his habeas claims to his federal Petition, Respondent acknowledges
 17 that he intended to prove that he met this burden, even though it was improperly pled.
 18 Respondent denies that Romero has exhausted his claims to the extent they are interpreted more
 19 broadly to encompass any systematic issues beyond this claim.

20 5. Respondent alleges that Romero fails to present a federal question when he contends
 21

22 1. On Page 1 of his federal Petition's Memorandum of Points & Authorities, Romero claims
 23 that this Court issued an order to show cause in case number M-10932. After reviewing his state
 24 court habeas petitions, it appears that Romero filed the same text in all his petitions, including his
 25 federal petition, and his reference to "this court" refers to the state superior court. (See Ex. 1.)
 26 Therefore, Respondent will not address this claim, as it appears directed at this Court in error.
 27 Respondent will also not address his claims stemming from the April 20, 2006 en banc decision by
 28 the Board denying him parole because it appears that Romero is only including this decision as
 additional factual information and not alleging a separate due process violation. Moreover, based
 on his petition, points and authorities, and attached exhibits, Romero's claim stem from his March
 7, 2007 Board denial, and he has not proven nor alleged that he properly exhausted any due process
 claims involving the April 20, 2006 en banc decision in state court.

1 that the state courts improperly applied or interpreted state law. Alleged errors in the application
 2 of state law are not cognizable in federal habeas corpus. *Pulley v. Harris*, 465 U.S. 37, 41
 3 (1984); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1984).

4 6. Respondent admits that the Petition is timely under 28 U.S.C. § 2244(d)(1).

5 Respondent admits that the Petition is not subject to any other procedural bar.

6 7. Respondent denies that Romero is entitled to federal habeas relief under 28 U.S.C. §
 7 2254 because the state court decisions were not contrary to, or an unreasonable application of
 8 clearly established federal law as determined by the United States Supreme Court, or based on an
 9 unreasonable determination of the facts.

10 8. Respondent denies that Romero has a federally protected liberty interest in parole and,
 11 therefore, alleges that he has not stated a federal question invoking this court's jurisdiction. The
 12 Supreme Court has not clarified the methodology for determining whether a state has created a
 13 federally protected liberty interest in parole. *See Greenholtz v. Inmates of Neb. Penal & Corr.*
 14 *Complex*, 442 U.S. 1, 12 (1979) (liberty interest in conditional parole release date created by
 15 unique structure and language of state parole statute); *Sandin v. Connor*, 515 U.S. 472, 484
 16 (1995) (federal liberty interest in correctional setting created only when issue creates an "atypical
 17 or significant hardship" compared with ordinary prison life); *Wilkinson v. Austin*, 545 U.S. 209,
 18 229 (2005) (*Sandin* abrogated *Greenholtz*'s methodology for establishing the liberty interest).
 19 California's parole statute does not contain mandatory language giving rise to a protected liberty
 20 interest in parole under the mandatory-language approach announced in *Greenholtz*. And
 21 continued confinement under an indeterminate life sentence does not impose an "atypical or
 22 significant hardship" under *Sandin* since a parole denial does not alter an inmate's sentence,
 23 impose a new condition of confinement, or otherwise restrict his liberty while he serves his
 24 sentence. Thus, Respondent asserts that Romero does not have a federal liberty interest in parole
 25 under either *Greenholtz* or *Sandin*. This issue is currently under review by an en banc panel in
 26 the Ninth Circuit. *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. 2008), but see *Sass v. California*
 27 *Board of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006).

28 9. Even if Romero has a federal liberty interest in parole, he received all due process to

1 which he is entitled under clearly established federal law because he was provided with an
2 opportunity to be heard and a statement of reasons for the Board's decision. *Greenholtz*, 442
3 U.S. at 16.

4 10. Respondent denies that the some-evidence test is clearly established Supreme Court
5 law in the parole context.

6 11. Respondent denies that clearly established federal law establishes that the overarching
7 factor in whether an inmate is unsuitable for parole is the determination of whether the inmate
8 poses a current threat or danger to society.

9 12. Respondent denies that clearly established federal law precludes the parole authority
10 from relying on the commitment offense or other immutable factors when reviewing an inmate's
11 parole suitability. Respondent further denies that clearly established federal law demands that
12 the parole authority can only rely on the commitment offense to deny parole if the crime is "more
13 than minimally necessary to convict him of the offense for which he is confined." No clearly
14 established federal law holds that the predictive value of the commitment offense dissipates after
15 a certain period of time.

16 13. Respondent denies that the Board relied on immutable factors to deny parole to
17 Romero at the March 7, 2007 hearing.

18 14. Respondent alleges that no clearly established federal or state law requires the parole
19 authority to compare an inmate's crime to other similar offenses in determining if a prisoner is
20 suitable for parole.

21 15. Respondent denies that clearly established federal or state law requires the parole
22 authority to find that a commitment offense is "particularly egregious" to deny parole.

23 16. Respondent denies that the Board's 2007 decision was predetermined, arbitrary, or
24 capricious. Respondent alleges that the Board's decision to deny parole was based on an
25 individualized consideration of Romero's suitability and is supported by evidence in the record.

26 17. Respondent denies that the state superior court's decision was based on an
27 unreasonable determination of the facts. Respondent further denies that Romero fails to refute
28 the state court's findings with clear and convincing evidence. To the extent that Romero's

1 merely disagrees with how the Board weighed the evidence or suggests an alternative
 2 interpretation of the evidence, he fails to show how the state court's decision amounts to a
 3 violation of federal due process. *Hill*, 472 U.S. at 455.

4 18. Respondent submits that an evidentiary hearing is not necessary because Romero's
 5 claims can be resolved on the existing state court record. *Baja v. Ducharme*, 187 F.3d 1075,
 6 1078 (9th Cir. 1999).

7 19. Respondent denies that Romero is entitled to release or parole. The remedy is limited
 8 to the process that is due, which is a new review by the Board comporting with due process. *See*
 9 *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-85 (9th Cir. 2002) (a liberty interest in parole
 10 is limited by the Board's exercise of discretion, and a due process error does not entitle an inmate
 11 to a favorable parole decision).

12 20. Romero fails to state or establish any grounds for habeas corpus relief.

13 21. Except as expressly admitted in this Answer, Respondent denies the allegations of the
 14 Petition.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **INTRODUCTION**

17 Romero claims that the Board's 2007 decision finding him unsuitable for parole violated his
 18 due process rights. But Romero merely alleges a disagreement with the Board's decision, and
 19 fails to establish that the state court decisions denying his due process claims were contrary to, or
 20 an unreasonable application of clearly established federal law as determined by the United States
 21 Supreme Court, or were based on an unreasonable determination of the facts. Thus, there are no
 22 grounds for federal habeas relief.

23 **ARGUMENT**

24 **I.**

25 **ROMERO HAS NOT SHOWN THAT HE IS ENTITLED TO RELIEF UNDER
 26 AEDPA.**

27 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a federal court
 28 may not grant a writ of habeas corpus unless the state court's adjudication was either:

1 1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as
 2 determined by the Supreme Court of the United States;" or 2) "based on an unreasonable
 3 determination of the facts in light of the evidence presented at the State Court proceeding."
 4 28 U.S.C. § 2254(d)(1-2) (2000). Romero has not demonstrated that he is entitled to relief under
 5 this standard.

6 **A. Romero Has Not Shown that the State Court Decisions Were Contrary
 7 to Clearly Established Federal Law.**

8 As a threshold matter, the Court must decide what, if any, "clearly established Federal law"
 9 applies. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). In making this determination, the Court
 10 may look only to the holdings of the United States Supreme Court governing at the time of the
 11 state court's adjudication. *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653 (2006) (quoting
 12 *Williams v. Taylor*, 529 U.S. 362 (2000)). The only case in which the Supreme Court has
 13 addressed the process due in state parole proceedings is *Greenholtz*. *Greenholtz*, 442 U.S. 1.
 14 The Supreme Court there held that due process is satisfied when the state provides an inmate an
 15 opportunity to be heard and a statement of the reasons for the parole decision. *Id.* at 16. "The
 16 Constitution does not require more." *Id.*²⁴ No other Supreme Court holdings require more at a
 17 parole hearing.

18 Romero does not contest that he received the *Greenholtz* protections. (See generally Pet.)
 19 Because *Greenholtz* was satisfied and *Greenholtz* is the only Supreme Court authority regarding
 20 an inmate's due process rights during parole proceedings, the state court decisions upholding the
 21 Board's decision were not contrary to clearly established federal law. Thus, the Petition should
 22 be denied.

23 Although Romero alleges that the Board's decision must be supported by some evidence,
 24 there is no clearly established federal law applying this standard to parole decisions. The

25
 26 2. The Supreme Court has cited *Greenholtz* approvingly for the proposition that the "level
 27 of process due for inmates being considered for release on parole includes an opportunity to be heard
 28 and notice of any adverse decision" and noted that, although *Sandin* abrogated *Greenholtz*'s
 methodology for establishing the liberty interest, *Greenholtz* remained "instructive for [its]
 discussion of the appropriate level of procedural safeguards." *Austin*, 545 U.S. at 229.

1 Supreme Court has held that under AEDPA a test announced in one context is not clearly
 2 established federal law when applied to another context. *Wright v. Van Patten*, ___ U.S. ___, 128
 3 S. Ct. 743, 746-47 (2008); *Schriro v. Landigan*, ___ U.S. ___, 127 S. Ct. 1933 (2007); *Musladin*,
 4 127 S. Ct. at 652-54; *see also, Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007); *Nguyen*
 5 v. *Garcia*, 477 F.3d 716, 718, 727 (9th Cir. 2007); *Crater v. Galaza*, 491 F.3d 1119, 1122 (9th
 6 Cir. 2007). The Supreme Court developed the some-evidence standard in the context of a prison
 7 disciplinary hearing, *Superintendent v. Hill*, 472 U.S. 445, 457 (1985), which is a fundamentally
 8 different context than a parole proceeding. Because the tests and standards developed by the
 9 Supreme Court in one context cannot be transferred to distinguishable factual circumstances for
 10 AEDPA purposes, it is not appropriate to apply the some-evidence standard of judicial review to
 11 parole decisions. While the Ninth Circuit has applied the some-evidence standard to parole
 12 decisions, this is improper under AEDPA, and the issue is currently pending before an en banc
 13 panel of the Ninth Circuit. *Hayward*, 527 F.3d 797.

14 AEDPA does not permit relief based on circuit caselaw. *Crater*, 491 F.3d at 1123, 1126 (§
 15 2254(d)(1) renders decisions by lower courts non-dispositive for habeas appeals); *Earp v.*
 16 *Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005) (“Circuit court precedent is relevant only to the
 17 extent it clarifies what constitutes clearly established law.” . . . “Circuit precedent derived from
 18 an extension of a Supreme Court decision is not clearly established federal law as determined by
 19 the Supreme Court.”); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000). Therefore,
 20 the Ninth Circuit’s use of the some-evidence standard is not clearly established federal law, is not
 21 binding on this Court, and is under review by an en banc panel. *Hayward*, 527 F.3d 797; *Biggs*
 22 v. *Terhune*, 334 F.3d 910 (9th Cir. 2003); *Sass*, 461 F.3d at 1128; *Irons v. Carey*, 505 F.3d 846,
 23 851 (9th Cir. 2007).

24 Similarly, Romero’s claim that the Board’s reliance on the unchanging factor of his
 25 commitment offense violates due process finds no support in Supreme Court precedent.
 26 Although the Ninth Circuit has suggested that this may amount to an additional due process
 27 claim, *Biggs*, 334 F.3d at 917, Romero does not and cannot cite to any clearly established
 28 Supreme Court authority prohibiting the Board from relying on immutable factors. Thus, federal

1 habeas relief is not available. 28 U.S.C. § 2254(d).

2 Finally, Romero's claim that the Board's decision was predetermined, arbitrary, and
 3 capricious lacks merit. The superior court specifically found that the hearing transcript "indicates
 4 that the Board of Parole Hearings addressed the factors required by law and provided an
 5 individualized consideration of these factors as they related to petitioner." (Ex. 2 at 5.) Thus, the
 6 court concluded, his claim that the decision was pre-determined, arbitrary and capricious was
 7 unfounded. (*Id.*) Furthermore, Romero's mere citation to the results of his past parole hearings
 8 does not prove that the Board's May 1, 2007 decision was predetermined, arbitrary, or
 9 capricious, as each hearing involves different panel members and their individualized assessment
 10 of the evidence in the record. Because the Board's decision was based on evidence of
 11 unsuitability, there is no support for Romero's claim that the Board's decision was
 12 predetermined, arbitrary, or capricious.

13 In sum, the only clearly established federal law setting forth the process due in the parole
 14 context is *Greenholtz*. Romero does not allege that he failed to receive these protections.
 15 Therefore, Romero has not shown that the state court decisions denying habeas relief were
 16 contrary to clearly established federal law.

17 **B. Romero Has Not Shown that the State Courts Unreasonably Applied
 18 Clearly Established Federal Law.**

19 Habeas relief may only be granted based on AEDPA's unreasonable-application clause
 20 where the state court identifies the correct governing legal rule from Supreme Court cases but
 21 unreasonably applies it to the facts of the particular state case. *Williams*, 529 U.S. at 406. Under
 22 this deferential standard, Romero must do more than merely establish that the state court was
 23 wrong or erroneous, but show that the application was unreasonable. *Id.* at 410; *Lockyer*, 538
 24 U.S. at 75. Respondent recognizes that the Ninth Circuit applies the some-evidence standard as
 25 clearly established federal law, but even accepting that premise, Romero is not entitled to federal
 26 habeas relief. Indeed, the California Supreme Court has adopted *Hill*'s some-evidence test as the
 27 judicial standard to be used in evaluating parole decisions, *In re Rosenkrantz*, 29 Cal. 4th 616
 28 (2002), and Romero has not shown that the state courts unreasonably applied the standard.

1 When, as here, the California Supreme Court denies a petition for review without comment,
 2 the federal court will look to the last reasoned decision as the basis for the state court's judgment.
 3 *Ylst v. Nunnemaker*, 501 U.S. 797, 804-06 (1991). In this case, the last reasoned decision is the
 4 Orange County Superior Court's order denying Romero's habeas petition. (Ex. 2.) The superior
 5 court found that there was some evidence in the record to support the Board's finding that
 6 Romero was unsuitable for parole based on the commitment offense, criminal history, social
 7 history, parole plans, and self-help issues. (Ex. 2 at 5-6.) The court found that evidence in the
 8 record supported the Board's conclusion that Romero would still pose a threat to society if
 9 released, including Romero's failure to regularly attend Alcoholics Anonymous from 2000 to
 10 2005. (*Id.*) The court's consideration of this evidence not only satisfies the some-evidence
 11 standard of judicial review, but also demonstrates that the Board did not violate Romero's right
 12 to due process in denying parole based on unchanging factors because this evidence was based on
 13 Romero's post-conviction progress and rehabilitation. (*Id.*) Thus, Romero has not shown that
 14 the state court unreasonably applied *Hill*, but rather asks this Court to re-weigh his suitability.
 15 Such a re-weighing has no basis in United States Supreme Court law. Accordingly, Romero's
 16 claim fails.

17 **C. Romero Has Not Shown that the State Court Decisions Were Based on
 18 an Unreasonable Determination of the Facts.**

19 Under § 2254(d)(2), habeas corpus can not be granted unless the state courts' decisions were
 20 based on an unreasonable determination of the facts in light of the evidence presented in the state
 21 court. The state court's factual determinations are presumed to be correct, and Romero has the
 22 burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

23 Although Romero alleges that the Board's decision is not supported by any evidence, he
 24 does not show by clear and convincing evidence that the state court made factual errors. First,
 25 the state court found that the Board's decision was based on factors in addition to the
 26 commitment offense and declined to analyze whether the commitment offense alone would have
 27 supported the Board's decision. (Ex. 2 at 5.) In turning to the additional unsuitability evidence
 28 in the record, the court found that there was some evidence to support the Board's conclusion

1 that Romero failed to show that he would abstain from alcohol abuse if released. (*Id.*) The court
 2 cited the fact that Romero was drunk at the time of the offense, an admitted alcoholic who began
 3 drinking at age fifteen, and the fact that his alcohol abuse contributed to his prior criminal record.
 4 (*Id.*) The court also found that his 2005 psychological assessment concluded that his potential
 5 for alcohol relapse was a risk factor and specifically cited the report's conclusion that his
 6 "minimal risk to the community if released was expressly conditioned upon his continued
 7 abstention from alcohol use and his continued involvement with alcohol recovery activities."
 8 (*Id.*) This evidence coupled with Romero's own admission in the transcript that he failed to
 9 regularly attend AA from 2000-2005 led the court to find that the Board's conclusion was
 10 sufficiently supported by evidence in the record. (*Id.* at 5-6.)

11 While Romero disagrees with the superior court's findings, he does not provide clear and
 12 convincing evidence that the state court erred in how they interpreted the facts. (Pet at 11-13.)
 13 Notably, Romero also does not prove that his attendance in AA was not sporadic; rather, he
 14 offers alternative explanations for this conclusions, citing to other self-help programming and
 15 claiming there were scheduling conflicts. (Pet. at 11-12.) Like his disagreement with the weight
 16 the Board assigned unsuitability evidence, then, Romero merely disagrees with how the state
 17 court interpreted the evidence as opposed to whether the state court made an unreasonable
 18 determination of the facts. Such disagreement does not entitle Romero to federal habeas relief.
 19 *Hill*, 472 U.S. at 455.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
CONCLUSION

2 Romero has not demonstrated that the state court decisions denying habeas relief were
3 contrary to, or an unreasonable application of, United States Supreme Court authority, or based
4 on an unreasonable determination of the facts. Thus, the Petition should be denied.
5

6 Dated: September 2, 2008

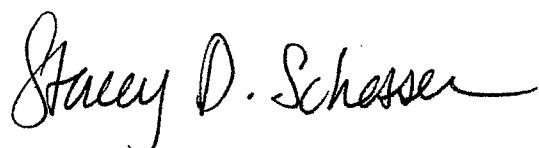
7 Respectfully submitted,

8 EDMUND G. BROWN JR.
Attorney General of the State of California

9 DANE R. GILLETTE
Chief Assistant Attorney General

10 JULIE L. GARLAND
Senior Assistant Attorney General

11 JESSICA N. BLONIEN
Supervising Deputy Attorney General

12
13 
14
15

16 STACEY D. SCHESSER
17 Deputy Attorney General
18 Attorneys for Respondent

19 20132019.wpd

20
21
22
23
24
25
26
27
28

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Romero v. Ayers**

No.: **C07-06382 TEH**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 2, 2008, I served the attached

**ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS;
MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Isidro Romero
D-07204
San Quentin State Prison
1 Main Street
San Quentin, CA 94964
In Pro Per**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 2, 2008, at San Francisco, California.

L. Santos
Declarant


Signature